

No. 89-1155

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

JAMES D. THOMAS,
Cross-Petitioner,

vs.

JOHN CARPENTER,
COUNTY OF SANTA BARBARA,
Cross-Respondents.

ON CROSS PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO CROSS PETITION

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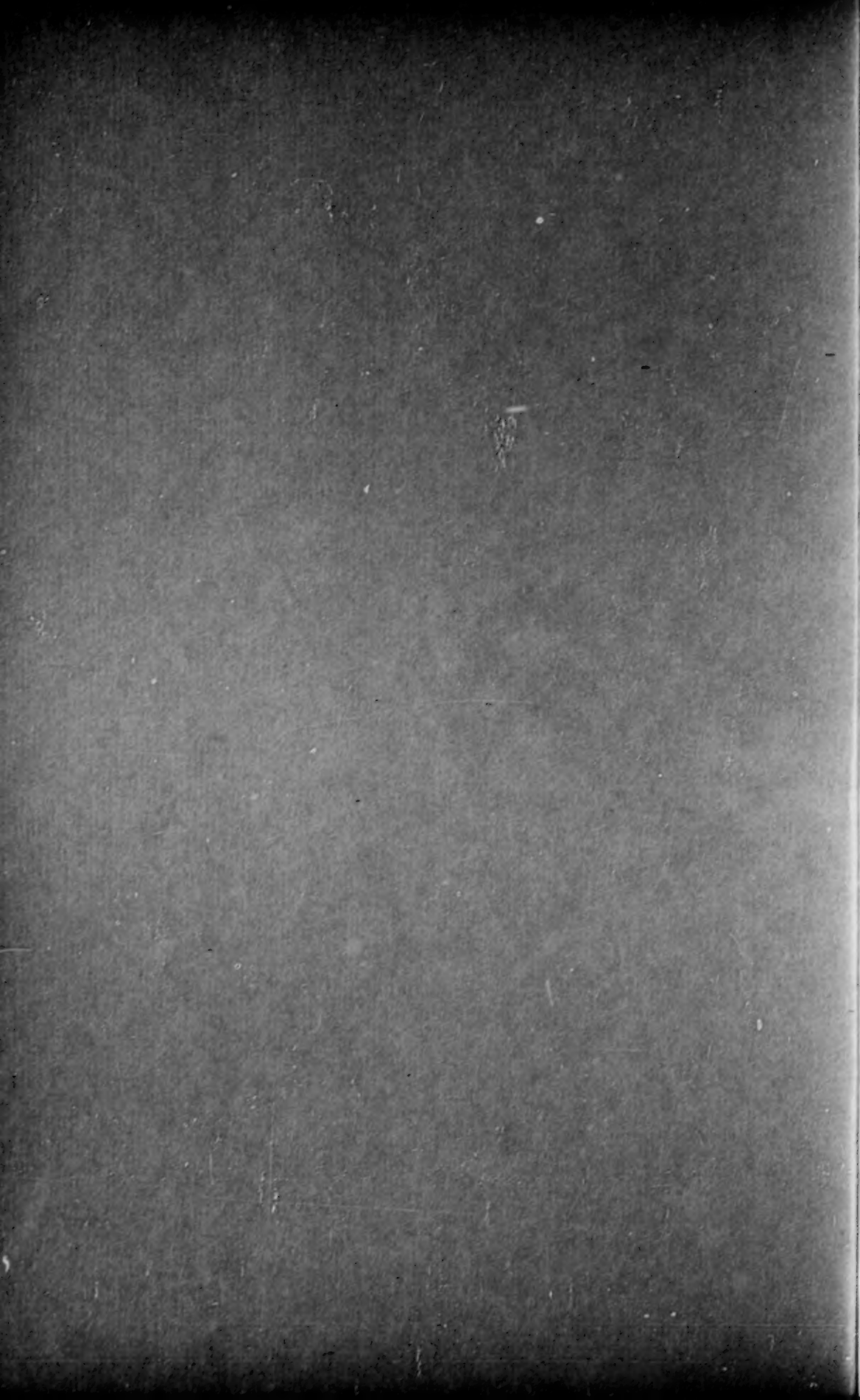
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OPPOSITION TO CROSS PETITION

The cross-respondents John Carpenter and the County of Santa Barbara, respectfully request that this Court deny the cross-petition for a writ of certiorari, seeking additional review of the Ninth Circuit's opinion in this case. That opinion is reported at 881 F.2d 828 (9th Cir. 1989).

REASONS FOR DENYING THE CROSS-PETITION

1. THOMAS' QUESTION IN HIS CROSS-PETITION MERELY REFLECTS A DISSATISFACTION WITH THE NINTH CIRCUIT'S REASONING AND CANNOT INCREASE THE RIGHTS GIVEN HIM BY THE COURT BELOW.

Essentially, Thomas' cross-petition covers only one aspect of the decision of the Ninth Circuit Court of Appeals. Thomas challenges what seems to be a mere comment in the Ninth Circuit's holding. The relevant comment is:

Carpenter may be able to prove at trial, or perhaps even by summary judgment, that Thomas' political loyalty in each of these positions is needed for the effective implementation of general department policy.

Thomas v. Carpenter, 881 F.2d 828, 832 (See, also, Appendix A, Cross-respondents' petition for a writ of certiorari, No. 89-933, filed December 7, 1989)

Apparently, Thomas' perceives this "holding" to condone political loyalty as a permissible consideration when determining first amendment protection. Thomas attacks the "holding" on the grounds that it overlooks a

critical distinction: that Thomas has permanent status as a civil service employee. According to Thomas, "political loyalty is the antithesis of a civil service system." (Cross-petition, page 42) Further, Thomas argues that civil service employees have a "property interest" in their employment relationship since they can only be discharged for cause.

Based upon these distinctions, Thomas argues that the *Elrod/Branti* line of cases should be eliminated as a basis of the court's consideration. These distinctions are not enough to warrant Supreme Court review of an issue more indicative of dissatisfaction than of actual conflict.

The general rule regarding the filing of cross-petitions has been stated by this Court on several occasions.

Merely attacking the reasoning of the lower court requires no cross-petition. In *U.S. v. New York Telephone Company*, 434 U.S. 159, 166 n.8 (1977), this Court held that a cross-petition was unnecessary since the respondent was free to defend a judgment on any ground that the law and the record permit, as long as such a defense would not expand the relief granted. (See, also, *Lagnes v. Green*, 282 U.S. 531, 538-539, (1931)).

Similarly, in *Mills v. Electric Auto-Lite Company*, 396 U.S. 375, 381 n.4 (1970), this Court held that when the logical result of acceptance of the respondent's additional argument would be to change more of the

judgment than is brought into issue by the initial appeal, a cross-petition must be filed.

As this Court is aware, Carpenter and the County of Santa Barbara are seeking review of the Ninth Circuit's decision. Review of the *entire* judgment (namely the reversal of the trial court's dismissal) is requested. Should review be granted by this Court, Thomas is free to raise his challenges to the Ninth Circuit's ruling.

By the terms of its questions presented, the propriety of Thomas' cross-petition is questionable. Thomas' argument involves an attack upon the reasoning of the lower court but does not involve a matter overlooked or ignored by it. As stated in *Appellate Practice in the United States*, Second Edition, Chapter 5, p. 123-124, a party,

"[N]eed not - indeed he cannot - appeal merely because of dissatisfaction with what the court has said or not said, or how it has reasoned, if there is no part of the court's order to which he objects."

In his appeal below, Thomas asked the Ninth Circuit to overturn the trial court's dismissal and allow him to proceed with his action. Through a reversal of the District Court without reservation, Thomas received the relief sought. By this remand, the complaint is given the same vitality it had prior to dismissal. Since there is no further relief or action that Thomas may receive, this cross-petition is unnecessary.

As evidenced by this Court in *Mills* the cross-petition procedure enables a non-appealing party to seek more relief than the judgment gave him. Here, there is nothing more that is available to Thomas in the event his cross-petition is successful. Because Thomas' cross-petition adds nothing to the review sought by the original petitioners, this cross-petition should be denied.

CONCLUSION

For all of the foregoing reasons, the cross-petition should be denied.

Dated: February 4, 1990

Respectfully submitted,
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